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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT HILL,

Defendant and Appellant.

E072217

(Super.Ct.No. RIF1800375)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed.

James M. Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Hill challenges his conviction for attempted murder on the ground the trial court committed reversible error in responding to the jury's question about how they should consider the lesser charge of attempted voluntary manslaughter in conjunction with the murder charge. For the reasons we explain below, we reject Hill's claim of error because the court's instructions, taken as a whole, were not likely to mislead the jury. We therefore affirm.

## **I FACTS**

### *A. Prosecution's Case*

The victim, Jane Doe, lived with her 10-year-old son in an apartment in Riverside. She had been dating Hill for about seven months when he attacked her with a knife on the evening of January 16, 2018.

According to Doe, she had accompanied Hill on some errands earlier that day and he had gotten angry with her, blaming her for accessing his Facebook account. They argued the entire way back to her apartment, where he dropped her off and left with her car. Later in the day, he texted her that her car was being towed, and as she worked on retrieving her car from the place he'd said it had been taken to, he texted again, "April Fools," and followed up with, "You ain't shit."

In the evening, Doe's brother and cousin stopped by her apartment for a visit. They stayed for a while and eventually broached the topic of Hill, asking her if he was treating her well. They told her she shouldn't be in a relationship with anyone who

disrespected her. Right around that time, Hill texted Doe that he was at the door. She heard a knock at the door but when she opened it, no one was there. Her apartment windows had been open during the visit, which meant anyone at the front door could hear the conversation she was having with her family.

Shortly after Doe's brother and cousin left, Hill returned. Doe could tell he was angry about something. He went to her bedroom, paced the floor for a few minutes, then sat on her bed. She heard him repeating the phrase "I'm gonna show them." She could sense they were about to have a fight and didn't want the neighbors to hear. She closed her bedroom window and turned around to find Hill there next to her. He began stabbing her with a knife. She put her hands up to shield herself and fell backwards, and he fell with her continuing his attack. She begged him to stop but he kept stabbing her, not saying anything. When she was finally able to roll away and gain some space from him, she grabbed her phone and ran out of the room. As she escaped she turned back and saw Hill lying on her bed, holding his chest. She called for her son as she ran but she didn't see him in his room. She found him in the parking lot outside of their apartment and immediately called the police.

Doe's son told the jury he had been in his room playing video games that night when he heard his mother screaming. The shrieks scared him so he ran out of the apartment, and as he passed her room he saw Hill stabbing her with a bloody knife. As soon as he was outside, he screamed for help but no one came to his aid. Finally his mother ran out of the apartment and called the police.

The officer who responded to Doe's call found her outside of her apartment, crying and in shock. Her clothes were torn and bloody and she wasn't wearing shoes. She was immediately taken to the hospital for her injuries. The trauma surgeon who treated her told the jury she had 15 stab wounds, many of which were deep and required staples or sutures. She had sustained multiple stab wounds in her chest, torso, arms, back, and legs. One deep wound near her right breast caused an air pocket in her chest wall that could have, but fortunately hadn't, damaged her lung. Another deep wound in her right abdomen came close to puncturing her colon, which would have been a surgical emergency. Due to their depth, these two wounds would have been fatal had they been in the same place on her left side.

After stabbing Doe, Hill locked himself inside her bedroom and lay down on the floor. He did not respond to police officers' demands that he come out with his hands up. The officers ultimately had to break down the door and shoot Hill in the shoulder with a sponge bullet to get him to respond and show his hands. They found near him on the floor a bloody folding knife locked in the open position. The knife had a three-inch blade and many of Doe's wounds were four inches deep.

Doe told the jury she had initially not wanted to press charges against Hill because she loved him and believed he just "needed help." Eleven months later, with her son suffering panic attacks as a result of Hill's attack and many of her wounds still causing her pain, she still wants Hill to get help but also thinks he should be prosecuted for what he did.

B. *Defense Case*

Hill testified in his own defense. According to him, Doe had been the one to pick the fight in the car earlier that day, and when he got to her apartment that evening, she had been the one to brandish the knife. He said she had been in a bad mood over something to do with his ex-wife's Facebook posts.

After running errands together that day, he had dropped her off at her apartment, left with her car, and didn't return until about 8:00 p.m. She was on the phone when she let him in. He made himself dinner and took it into the bedroom to eat it on the bed. She came into the room and sat on the bed and drank a can of beer quickly. She took the can into the kitchen and when she returned she shut the bedroom door behind her. She asked him if the window was open and he said he didn't know. She walked over to the window and tried to push him over as she passed him. He caught his balance and jumped up to face her. That's when he saw she was holding a knife. She pointed it at him and asked where he "really" went in her car that day. Hill admitted the knife was his, but said it was usually put away in his nightstand.

Hill said he lunged at Doe at that moment, knocking her into the wall and taking the knife from her. Hill said he was able to get the knife out of her hands quickly, in a matter of seconds. He acknowledged during his testimony that he knew Doe was no longer a threat to him at that point and that he should have just walked away. But he told the jury he was angry with Doe for pulling a knife on him and wanted to "teach her a lesson."

Hill denied he had intended to kill Doe. He said he had just been “poking” her with the knife, but then they fell over and rolled around, and all the while he was going up and down with the arm that was holding the knife. He thought he might have “poked” her a few more times as they “wrestled” and rolled around.

As soon as Doe escaped the apartment, Hill felt bad about hurting her and tried to kill himself with the knife. The officer who arrested him said he had two superficial scratches on his chest that didn’t require any cleaning or treatment.

Hill said he may have struck Doe earlier in their relationship but couldn’t remember. He admitted having a conviction for domestic violence on his criminal record.

C. *Jury Instructions, Deliberation, and Verdict*

The prosecution tried Hill on three counts—attempted premeditated murder (Pen. Code, §§ 664/187, subd. (a), unlabeled statutory citations refer to this code), inflicting corporal injury resulting in a traumatic condition (§ 273.5, subd. (a)), and assault with a deadly weapon, (§ 245, subd. (a)(1)). The prosecution alleged Hill had inflicted great bodily injury on the victim when committing all three crimes (§ 12022, subd. (b)(1)) and had personally used a knife when committing the attempted murder and corporal injury (§ 12022.7, subd. (e)).

Before closing argument, the trial court instructed the jury, among other things, on the prosecution’s burden of proof, attempted murder (CALCRIM No. 600), and the lesser charge of attempted voluntary manslaughter (CALCRIM No. 603). In addition to setting out the elements of attempted voluntary manslaughter, CALCRIM No. 603 tells the jury,

“The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder.”

The trial court also gave CALCRIM No. 3517, which tells the jury how to consider a lesser charge in conjunction with a greater. “If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] Now I will explain to you the crimes affected by this instruction. [¶] Attempted voluntary manslaughter is a lesser crime of attempted murder charged in Count 1. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.” The instruction goes on to explain in detail how to complete the verdict forms based on different possible findings on the greater and lesser crimes.

During closing argument, the prosecutor argued the evidence showed Hill intended to murder the victim and was not acting under provocation. He argued Hill was not telling the truth when he said Doe had brandished the knife first—and that even if that part of his testimony were true—it wasn’t sufficient to provoke a reasonable person to try to kill her. Defense counsel countered in her closing that the attack was absolutely the

result of provocation because Doe had threatened Hill with a knife. She said if the jury was going to convict Hill of anything charged in count 1, it had to be attempted voluntary manslaughter.

After closing argument, the trial court gave the jury additional instructions on the verdict forms and returned to the topic of the greater and lesser charges for count 1.

“We’ll start with Count 1. Count 1, charge is attempted murder. There are two possible verdicts for Count 1. There is attempted murder and then there is a lesser of attempted voluntary manslaughter. So there’s a lesser charge. For each of those attempted murder and attempted voluntary manslaughter, you will have a verdict form that says ‘Guilty’ and ‘Not Guilty.’ [¶] Now, you’re free to discuss in any fashion you want, in any order you want, in any manner you want, the different parts of those two different counts and whether or not one or the other applies. But you can only find Mr. Hill guilty of the lesser crime if you first unanimously find him not guilty of the great crime. So please keep that in mind.”

During deliberation, the jury sent several questions to the court. The first questions came in shortly after the jury retired and focused on count 2, the corporal injury charge. The following day, they asked a question about the definition of premeditation, indicating they had moved on to consider count 1, the attempted murder charge. The day after that, after about two and a half days of deliberation, the jury asked the question at issue in this case, “If we agree on CALCRIM 600 [attempted murder] do we automatically disregard CALCRIM 603 [attempted voluntary manslaughter]?” After discussing potential answers

with counsel, the court gave the following response, which both counsel agreed on and which Hill now challenges (specifically, the italicized language):

“You may consider the charged crime (600) and the lesser crime (603) in whatever order you wish. You must unanimously reach a verdict. You can only convict defendant on the lesser crime (603) if you have first found him not guilty of the greater crime (600). If you unanimously find the defendant guilty of the greater crime (600), *you are not required to consider*—and the court cannot accept a verdict on—*the lesser crime (603)*. If you unanimously find the defendant not guilty of the greater crime (600), you should reach a verdict if possible on the lesser crime (603).” (Italics added.)

The jury continued to deliberate another two hours then sent the court a note saying they had reached verdicts but then had “changed [their] decision.” They wanted to know if they could “void” the signed verdicts and fill out new forms because they had reached a new decision. About 10 minutes later, they sent the court a note asking what to do if they couldn’t reach an agreement on count 1.

The court called the jury into the courtroom and asked them to give numerical tallies on their votes for count 1. The foreperson said they had gone from unanimous, to 6-5-1, to 9-3, back to unanimous, then to 11-1.

The foreperson explained that their disagreement wasn’t “specifically for the counts themselves,” but rather for the “subsections” or findings and allegations associated with the counts. In response, the court told the jury, “you need to decide, obviously, as to the count itself and the lesser, obviously, as well.” The court went on, “[a]nd then if and

only if you reach a verdict on the greater charge, you have to consider the [premeditation and deliberation] finding. If and only if you reach a verdict on the greater or lesser, you have to consider the [knife and bodily injury] allegations. So you need to take it as a whole, so to speak. [¶] . . . [¶] . . . But I think the best thing for you to do would be first decide, Is it guilty, not guilty for Count 1 and/or the lesser. Just deal with that charged count. And then you either find him guilty or not guilty of Count 1 or the lesser and then deal with the finding if it applies and then deal with the allegations if [they] appl[y].”

The court asked the jury to continue deliberating because they did not appear to be deadlocked. About two hours later, they sent a question about the lesser voluntary manslaughter charge, asking whether Hill’s reaction to the provocation had to be the kind of reaction an “average person” would have had. As the court and counsel were discussing how to answer that question, the jury informed the court they had reached a verdict.

They found Hill guilty of attempted murder but found the premeditation and deliberation allegation not true. They did, however, find true the knife use and great bodily harm allegations. They also found Hill guilty of the other two counts, assault and corporal injury, and found true the accompanying allegations. The trial court sentenced him to 14 years in prison.

## II

### ANALYSIS

Hill asserts a single ground for reversing his attempted murder conviction. He argues the trial court's response to the jury's question about considering the greater and lesser charges in count 1 constitutes reversible error. Specifically, he claims the court effectively told the jury they were "not required to consider" CALCRIM No. 603 (the instruction on attempted voluntary manslaughter) if they found him guilty of attempted murder, and that this lowered the People's burden of proof, allowing them to obtain a conviction for attempted murder without having to prove *lack of provocation* beyond a reasonable doubt. As we explain, we disagree with Hill's characterization of the court's response and find no error in its statements to the jury.

But before we get to the merits of Hill's appeal, we reject the People's contention that he waived his challenge to the instruction because his counsel specifically agreed to it. The waiver cases the People rely on involve instances where the defense attorney agreed (or didn't object) either to the trial court's decision not to respond to the jury's question or its decision not to read back portions of the record. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1352; *People v. Harris* (2008) 43 Cal.4th 1269, 1317; see also *People v. Roldan* (2005) 35 Cal.4th 646, 729.) But where, as here, the defendant's claim on appeal is not that the court *should have responded* to the question but rather that it gave a *legally inaccurate response*, that claim cannot be waived. (E.g., *People v.*

*Covarrubias* (2016) 1 Cal.5th 838, 904-905 (*Covarrubias*); *People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.)

Turning to the merits, section 1138 provides: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.” This provision imposes upon the court a duty to provide a deliberating jury with information they “desire[] on points of law.” (*People v. Smithey* (1999) 20 Cal.4th 936, 985.) “We review de novo the legal accuracy of any supplemental instructions provided.” (*People v. Franklin* (2018) 21 Cal.App.5th 881, 887 (*Franklin*).)

A defendant challenging a jury instruction as legally inaccurate “must demonstrate a reasonable likelihood that the jury understood the instruction in the way [the defendant has] asserted.” (*Covarrubias, supra*, 1 Cal.5th at p. 905.) “[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.” [Citation.] In reviewing an ambiguous instruction, we inquire whether there is a reasonable likelihood that the jury misunderstood or misapplied the instruction in a manner that violates the Constitution. [Citation.] ‘A single instruction is not viewed in isolation, and the ultimate decision on whether a specific jury instruction is correct and adequate is determined by consideration of the entire instructions given to the jury.’” (*Id.*

at p. 906.) In considering such a challenge, we presume the jurors are intelligent and capable of understanding and applying the court’s instructions. (*Id.* at p. 905.)

Hill’s challenge to the court’s instruction involves the interlocking relationship between murder and voluntary manslaughter. ““Murder is the unlawful killing of a human being with malice aforethought.”” [Citation.] “Generally, the intent to unlawfully kill constitutes malice.” [Citation.] But evidence that the defendant was acting in a sudden quarrel or heat of passion can “*negat[e] the element of malice* that otherwise inheres in such a homicide.” [Citation.] Thus, “[i]f the issue of provocation . . . is [ ] “properly presented” in a murder case [citation], the *People* must prove *beyond reasonable doubt* that [those] circumstances were *lacking* in order to establish the murder element of malice.”” (*Franklin, supra*, 21 Cal.App.5th at pp. 887-888.)

Hill argues the jury’s question was whether—if they agreed Hill was guilty of attempted murder—they could “automatically disregard” *the contents of* CALCRIM No. 603, which, crucially, include the sentence saying the People bear the burden of proving lack of provocation beyond a reasonable doubt. He further argues that the court answered this question in the affirmative, telling them they were free to disregard the contents of CALCRIM No. 603 if they found him guilty of attempted murder.

We do not agree with Hill’s characterization of the jury’s question or the court’s response. In our view, it’s clear that during deliberation the jury used the CALCRIM instruction numbers as shorthand references or stand-ins for the offenses they cover. They asked, “If we *agree on* CALCRIM 600, do we automatically disregard CALCRIM

603?” (Italics added.) It makes sense to agree on Hill’s guilt concerning the offenses; it doesn’t make sense to agree on a jury instruction. And we suspect we know why the jury adopted this shorthand convention. The foreperson wrote all the questions (of which there were many) by hand, and listing the full title of the offenses could become understandably burdensome.

When viewed through this lens, the court’s response is undoubtedly a correct statement of the law. The court said, “If you unanimously find the defendant guilty of the greater crime (600), *you are not required to consider*—and the court cannot accept a verdict on—*the lesser crime (603)*.” (Italics added.) Adopting the jury’s shorthand convention and referring to attempted murder simply as “600” and attempted voluntary manslaughter as “603,” the court was simply reiterating a portion of CALCRIM No. 3517. Namely, that if the jury unanimously found Hill guilty of attempted murder, they didn’t need to consider whether he was also guilty of attempted voluntary manslaughter (because they weren’t permitted to find him guilty of both crimes).

We find this the more natural reading of the court’s response not only because it’s a correct statement of the law and because it’s clear the court was adopting the jury’s shorthand convention, but also because this reading is consistent with everything the court told the jury before and after giving the response. Before the jury retired to deliberate, the court instructed them count 1 had a lesser included charge associated with it and the People bore the burden of proving lack of provocation beyond a reasonable doubt. The court also told the jury they had to consider both the greater and lesser

charges—and could do so in any order they wished—but could only reach a guilty verdict as to one.

Finally, and perhaps most importantly for our inquiry (which, again, is to determine in view of *all of the instructions* whether it’s reasonably likely the jury understood the court’s response in the way Hill argues), the court went on to give the jury additional instructions on how to consider the greater and lesser charges in count 1 *after having given* the response Hill challenges in this appeal. Those additional instructions make clear the court was not telling the jury to ignore the content of CALCRIM No. 603, under any circumstances. The court told the jury, “you need to decide, obviously, as to the count itself *and the lesser, obviously, as well,*” and stressed they must consider count 1 “as a whole.” (Italics added.) And the record suggests they did just that, because after the court issued its response and after it sent the jury back to deliberate on count 1, they asked the court a question about the meaning of provocation, demonstrating they were considering CALCRIM No. 603, in general, and provocation, specifically.

Hill’s attempt to analogize his case to *People v. Thompkins* (1987) 195 Cal.App.3d 244 and *Bollenbach v. United States* (1946) 326 U.S. 607, 609 is unpersuasive. In both those cases, the juries were hopelessly deadlocked on a particular charge but were then able to reach verdicts after the trial courts gave them an incorrect instruction on the counts. (*Thompkins*, at pp. 251-252; *Bollenbach*, at p. 611.) In other words, the courts’ erroneous instructions were the “last word” on the subject and led to quick verdicts from a previously deadlocked jury. (*Bollenbach*, at p. 612.)

That was not the case here. In Hill’s trial, the jury was not deadlocked on count 1 (they had reached a unanimous verdict twice before settling on their final verdict) and the challenged instruction was not the court’s last word on how to consider the greater and lesser charges. As we’ve seen, the court called the jury back into the courtroom and properly instructed them to consider count 1 as a whole and to consider both the greater and the lesser charges. It also bears noting that the jury’s impasse appeared to concern the allegations attending count 1, not the offense itself. As noted, the foreperson told the court the vote tallies for count 1 weren’t specifically for the count itself but were for the “subsections” or separate allegations “[they] were voting on.”

On this record, we conclude it is not reasonably likely the jury interpreted the court’s response to mean the People no longer had to prove lack of provocation.

### **III**

#### **DISPOSITION**

We affirm the judgment.

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SLOUGH  
J.

We concur:

MILLER  
Acting P. J.

RAPHAEL  
J.